

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|--|---|----------------|
| NAOMI MITCHELL |) | |
| Claimant |) | |
| v. |) | |
| |) | CS-00-0448-304 |
| HEARTSPRING INC. |) | AP-00-0451-631 |
| Respondent |) | |
| and |) | |
| |) | |
| ACCIDENT FUND GENERAL INSURANCE CO. |) | |
| Insurance Carrier. |) | |

ORDER

Respondent requests review of the June 8, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Phillip Slape appeared for Claimant. William Townsley appeared for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held June 4, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The Issues on Appeal are:

1. Whether the prevailing factor for Claimant's need for medical care is her work-related accident of October 3, 2016?
2. Whether the treatment ordered by the ALJ is reasonably necessary pursuant to K.S.A. 44-510h(a)?

FINDINGS OF FACT

Claimant worked as a paraeducator for Respondent, a facility specializing in assisting young adults with special needs and behavioral issues. Respondent provides innovative care and therapies, which include residential, day school and autism services. On October 3, 2016, Claimant and a co-worker were helping a 19-year-old male student go to bed. The student acted out against Claimant, striking her once in the right ear and once on the left side of her jaw. Claimant felt throbbing, pain and pressure in her jaw, as well as ringing in her ear.

Claimant was evaluated at Wesley Hospital emergency room shortly after the incident. Dr. Jose R. Cepeda examined Claimant and noted slight swelling on the left side of her face, mild left side occlusion, but no issues for the right side of her face. A CT scan was performed revealing no mandibular fracture and no temporomandibular dislocation. The CT scan also revealed mild mucosal thickening in the left maxillary sinus; the remainder of the paranasal sinuses and mastoid air cells were clear; and she had prominent adenoids, tonsils, and uvula.

On October 5, 2016, Claimant was evaluated at the Immediate Medical Center for left jaw and right ear pain. She treated with Sean Prolago, PA-C for approximately three weeks. The ringing in her ears improved and resolved. She continued to experience pain and popping in the jaw. The provider recommended a referral to a maxillofacial surgeon for evaluation of the clicking in her jaw.

Claimant was sent to Roger Baker, DDS, for evaluation on December 5, 2016. He found pain upon palpation in her temporomandibular (TMJ) joints, bilaterally, pain upon opening her mouth and tenderness in the muscles surrounding her jaw. He diagnosed a dislocated disc in her right TMJ and fitted her for a mouth guard orthotic. Claimant followed up with Dr. Baker for adjustments in April and August 2017. A dispute arose between Dr. Baker and Respondent/insurance carrier resulting in the discontinuation of authorized medical care with Dr. Baker.

No authorized medical care was provide by Respondent for an extended period of time. Upon Claimant's request, Respondent authorized medical care with Joseph Baba, DDS. Claimant was evaluated by Dr. Baba on May 16, 2019. He diagnosed:

TM primary disorder with the diagnosis of bilateral disc displacement without reduction, arthritis/capsulitis of the temporomandibular join, myositis, synovitis, headache, cervicalgia, myalgia and jaw pain.¹

¹ P.H. Trans., Cl. Ex. A at 7.

Dr. Baba provided new orthotics for Claimant. His treatment regimen included laser therapy on her jaw, motor nerve reflex testing, and home exercises for her tongue and neck. On October 29, 2019, Dr. Baba found Claimant to be at MMI for decompression therapy, but she needed to continue follow-ups during the “weaning” process. In addition, Dr. Baba renewed his recommendation for a referral to an ENT physician for evaluation of her nasal patency issues. An examination was scheduled with Dr. Dilling in Edmond, Oklahoma on February 14, 2019, but was canceled by Respondent.

Instead, Respondent scheduled Claimant to see Dr. Chris Fevurly for an evaluation on March 30, 2020. Dr. Fevurly’s work-related diagnosis was Claimant sustained a contusion of the right mandible and right temporal area with development of right TMJ syndrome. He opined these symptoms had resolved. As for the remainder of Claimant’s complaints, he opined they were not causally related to the accidental injury and therefore not work related. He also opined Claimant reached MMI for her work-related injuries on April 17, 2017.

Based upon Dr. Fevurly’s prevailing factor opinions, Respondent terminated medical treatment. Dr. Baba provided an undated opinion letter. He stated Claimant received active therapy from July 11, 2019, through October 28, 2019. She is now in the maintenance phase of her treatment. He opined:

Long term resolution and stabilization of her condition will depend upon her ability to breathe easily through her nose. Ms. Mitchell’s nasal obstruction, constriction and congestion results in mouth breathing and an unstable mandibular posture. Further, these same nasal conditions produce Respiratory Related Arousals (RERA’s) which cause aberrant mandibular movements, adversely loading her temporomandibular joints throughout the night. These nasal conditions hamper her chances at successful long-term stability and freedom from pain due to her TM joint conditions.

...

For these reasons, it is medically necessary that she have an otolaryngologic examination and appropriate treatment to improve her nasal patency.²

In a letter drafted by Claimant’s counsel and addressed to Dr. Baba, dated March 20, 2020, he opined the injury sustained by Claimant when struck in the face is the prevailing factor causing the injury and need for the medical treatment sought.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ granted Claimant’s requests for treatment with Dr. Baba and his referral for an otolaryngologic examination. Respondent requests review of the ALJ’s Order.

² P.H. Trans., Cl. Ex. A at 4.

Respondent argues the prevailing factor for Claimant's medical care is not the work-related event. Claimant argues the ALJ exercised his sole authority under K.S.A. 44-534a(a)(2) to evaluate evidence presented to him during the preliminary hearing to make the determination Claimant needed continued medical treatment, and his determination is not appealable under the same.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

The Board first addresses the jurisdictional issue. The Kansas Workers Compensation Act states the Board's authority to consider appeals of preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma, or resulting injury, whether the injury arose out of and in the course of employment, whether notice was given or whether "certain defenses" apply.⁵ Claimant sought continued medical treatment with Dr. Baba and referral for an otolaryngologic examination as recommended by Dr. Baba. In general, preliminary hearing Orders granting or denying medical benefits are not subject to Board review. The authority to make a determination regarding medical care rests clearly within the authority granted to the ALJ by K.S.A. 44-534a.⁶

Respondent argues the Board has jurisdiction to hear this appeal because the question presented is "whether Claimant's constricted airway and nasal patency arise out of a work related matter." This misstates the issue.

It is Claimant's burden of proof to establish her right to an award of compensation including the various conditions on which her rights depend.⁷ "Burden of proof" is defined as:

³ See K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁴ See K.S.A. 2018 Supp. 44-555c(j).

⁵ See K.S.A. 44-534a(a)(2).

⁶ See *Vizcarra v. LoanSmart, LLC.*, No. 1,079,548, 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).

⁷ See K.S.A. 44-501b(c).

the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the whole record.⁸

An injury by accident shall be deemed to arise out of and in the course of employment only if the accident is the prevailing factor causing the injury, medical condition and result in disability or impairment.⁹

"Prevailing" means:

the primary factor, in relation to any other factor.¹⁰

There is no dispute Claimant sustained an accidental injury on October 3, 2016, when she was struck by the student. This accidental injury resulted in Claimant's current medical condition – temporomandibular joint dysfunction. She continues to experience pain and dysfunction in her jaw, especially when using it. Her complaints of pain have remained essentially unchanged since the date of her accident. The medical treatment received to date has done little to alleviate her symptoms.

Respondent is trying to maneuver around the jurisdictional issue by arguing the accidental injury is not the prevailing factor requiring treatment for the nasal obstruction, constriction and congestion. In other words, the prevailing factor analysis should focus on the underlying need or cause for medical care for Claimant's underlying congenital and preexisting conditions. Dr. Baba has recommended these issues need evaluated in an effort to improve the treatment regimen in dealing with Claimant's temporomandibular joint dysfunction.

The Board previously discussed the scope of the duty of an employer to provide medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury contained in K.S.A. 44-510h. In *Ratcliff v. Easyhome*, No. 1,057,822, 2012 WL 4040467 (Kan. WCAB Aug. 16, 2012), bariatric surgery was recommended in order to perform back surgery to treat the work injury. The Board defined the bariatric surgery as a means to an end, similar to diagnostic testing. In so doing, the Board noted the procedure would not cure or relieve the Claimant from the effects of the injury, but would assist in diagnosing and treating the injury.¹¹ The same is true for this Claimant. She is in need of on going medical treatment. Dr. Baba's continued treatment and requested

⁸ See K.S.A. 44-508(h).

⁹ See K.S.A. 44-508(f)(2)(B)(ii).

¹⁰ See K.S.A. 44-508(g).

¹¹ See *ib.*

referral for an otolaryngologic examination is reasonably necessary to cure and relieve Claimant from the effects of her injury.

Having determined the Board does not have jurisdiction to hear Respondent's appeal, this Board Member will not address Respondent's argument regarding the reasonableness of the medical treatment ordered by the ALJ pursuant to K.S.A. 44-510h(a).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated June 8, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2020.

CHRIS A. CLEMENTS
APPEALS BOARD MEMBER

c: Via OSCAR

Phillip Slape, Attorney for Claimant
William Townsley, Attorney for Respondent and its Insurance Carrier
The Honorable Gary K. Jones, Administrative Law Judge